



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R06-OAR-2010-0652; FRL- 9900-73-Region6]

Approval and Promulgation of Implementation Plans; Oklahoma; Revisions to Excess Emissions Requirements; Finding of Substantial Inadequacy: and Call for Oklahoma State Implementation Plan Revision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing three actions concerning revisions to the Oklahoma State Implementation Plan (SIP) submitted by the State of Oklahoma on July 16, 2010 (the July 16, 2010 SIP submittal). These actions address revisions to the Oklahoma Administrative Code (OAC), Title 252, Chapter 100, Subchapter 9 - Excess Emission Reporting Requirements (Subchapter 9). In the first action, we are proposing approval of certain provisions of the July 16, 2010 SIP submittal which are consistent with the Clean Air Act (CAA or Act). In the second action, we are proposing a limited approval and limited disapproval of certain other provisions of the July 16, 2010 SIP submittal which will have the overall effect of strengthening the Oklahoma SIP, but a portion of which are inconsistent with the requirements of the CAA. In the third action, we are proposing a finding of substantial inadequacy and proposing a SIP call with a proposed submittal date for certain provisions of the July 16, 2010 SIP submittal associated with the proposed limited approval and limited disapproval found to be inconsistent with CAA requirements, as set forth in the second action. If finalized, the SIP call associated with the

proposed finding of substantial inadequacy will not, by itself, trigger a sanction clock for Oklahoma. This rulemaking is being taken in accordance with section 110 of the Act.

DATES: Comments must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Submit your comments, identified by Docket No. EPA-R06-OAR-2010-0652, by one of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.

- U.S. EPA Region 6 “Contact Us” web site: <http://epa.gov/region6/r6coment.htm>. Please click on “6PD” (Multimedia) and select “Air” before submitting comments.

- E-mail: Mr. Guy Donaldson at donaldson.guy@epa.gov. Please also send a copy by email to the person listed in the FOR FURTHER INFORMATION CONTACT section below.

- Fax: Mr. Guy Donaldson, Chief, Air Planning Section (6PD-L), at fax number 214-665-7263.

- Mail: Mr. Guy Donaldson, Chief, Air Planning Section (6PD-L), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202-2733.

- Hand or Courier Delivery: Mr. Guy Donaldson, Chief, Air Planning Section (6PD-L), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202-2733. Such deliveries are accepted only between the hours of 8:00 a.m. and 4:00 p. m. weekdays except for legal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA-R06-OAR-2010-0652. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at www.regulations.gov, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information the disclosure of which is restricted by statute. Do not submit information through www.regulations.gov or e-mail that you consider to be CBI or otherwise protected from disclosure. The www.regulations.gov website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through www.regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy at the Air Planning Section (6PD-L), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202-2733. The file will be made available by appointment for public inspection in the Region 6 FOIA

Review Room between the hours of 8:30 a.m. and 4:30 p.m. weekdays except for legal holidays. Contact the person listed in the FOR FURTHER INFORMATION CONTACT paragraph below to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. There will be a 15 cent per page fee for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas 75202-2733.

The State submittal is also available for public inspection at the State Air Agency listed below during official business hours by appointment:

Oklahoma Department of Environmental Quality (ODEQ), Air Quality Division, 707 North Robinson Street, Oklahoma City, Oklahoma 73101.

FOR FURTHER INFORMATION CONTACT: Mr. Alan Shar, Air Planning Section (6PD-L), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202-2733, telephone (214) 665-6691, fax (214) 665-7263, e-mail address Shar.Alan@epa.gov.

SUPPLEMENTARY INFORMATION:

Throughout this document “we,” “us,” and “our” refer to EPA.

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I. Summary and Background

A. What actions are we proposing?

We are proposing three related actions regarding the July 16, 2010 SIP submittal from the State of Oklahoma. This SIP submittal contains revisions to Oklahoma's excess emission rules, found in OAC, Title 252, Chapter 100, Subchapter 9 (Subchapter 9). More specifically, the July 16, 2010 SIP submittal: (1) withdraws revisions to Subchapter 9 submitted to EPA on February 14, 2002; and (2) requests EPA's approval of revisions to Subchapter 9 made by the State in 2010 (2010 Subchapter 9 provisions). EPA approval of the 2010 Subchapter 9 provisions would replace the Subchapter 9 provisions promulgated by the State in 1994, and last approved in 1999 by EPA as part of the current Oklahoma SIP. The 2010 Subchapter 9 provisions were intended by the state to meet the requirements of the CAA with respect SIP provisions concerning excess emissions during startup, shutdown, and malfunction. Oklahoma developed the July 16, 2010 SIP submittal based on EPA's guidance recommendations in place at the time of submission. As a part of the July 16, 2010 SIP submittal, the State took several important steps to revise the existing SIP to make it consistent with CAA requirements, including: (1) improvements to SIP provisions pertaining to excess emissions reporting requirements; (2) elimination of prior SIP provisions that created an exemption, exercised through director discretion, for excess emission

events which was not consistent with CAA requirements; and (3) creation of affirmative defense provisions for excess emissions for qualifying sources in lieu of previously impermissible exemptions for violations of SIP emission limitations during such events. The EPA appreciates the efforts of ODEQ to improve the enforceability of their rules with respect to excess emissions. The EPA's proposed actions on ODEQ's 2010 Subchapter 9 provisions do not extend to sources of air emissions or activities located in Indian country, as defined at 18 USC §1151.¹ We are proposing three related actions in this rulemaking.

First Action:

In the first action, we are proposing approval of the following sections of the 2010 Subchapter 9 provisions as a revision to the Oklahoma SIP: (1) section 252:100-9-1.1 Applicability; (2) section 252:100-9-2 Definitions; and (3) sections 252:100-9-7(a) through 252:100-9-7(e).² As discussed more fully below, these provisions generally concern excess emission reporting requirements which improve the State's ability to review, analyze, and act in response to excess emission reports so that the air quality impacts associated with such emissions are minimized. These revised provisions thus allow better assessment of compliance with applicable SIP emission limitations and enforcement in the event that is necessary. EPA notes that these sections operate independently from the affirmative defense requirements of section 252:100-9-8, the subject of today's second proposed action. Table 1 below identifies sections of the 2010 Subchapter 9 provisions which EPA is proposing for approval into the Oklahoma SIP.

Table 1 – Sections of the 2010 Subchapter 9 provisions proposed for approval.

¹ Oklahoma's July 16, 2010 SIP submittal does not include an express demonstration of authority over emission sources or activities in Indian country. Therefore, our proposed approval and limited approval/disapproval of the 2010 Subchapter 9 provisions does not extend to emission sources or activities located in Indian country. This is consistent with the CAA requirement that we approve state and tribal programs only where there is a demonstration of adequate authority. *See* CAA sections 110(a)(2)(E) and 110(o).

² Throughout this proposed rulemaking, reference to sections of the 2010 Subchapter 9 provisions will be those sections of the Oklahoma Administrative Code (OAC), Title 252, Chapter 100, Subchapter 9, as submitted to EPA on July 16, 2010, for approval as a revision to the Oklahoma SIP.

Section of the 2010 Subchapter 9 Provisions	Title	Information
252:100-9-1.1	Applicability	Propose approval
252:100-9-2	Definitions	Propose approval
252:100-9-7(a)	Immediate notice	Propose approval
252:100-9-7(b)	Excess emission event report	Propose approval
252:100-9-7(c)	Ongoing events	Propose approval
252:100-9-7(d)	Alternative reporting	Propose approval
252:100-9-7(e)	Certificate of truth, accuracy and completeness required	Propose approval

Second Action:

In the second action, we are proposing a limited approval and limited disapproval of the 2010 Subchapter 9 provisions which are not the subject of EPA's first action discussed above. Specifically, we are proposing a concurrent limited approval and limited disapproval of section 252:100-9-1. Purpose, and the entire section 252:100-9-8. Affirmative defenses, as a revision to the Oklahoma SIP. Table 2 below identifies sections of the 2010 Subchapter 9 provisions proposed for concurrent limited approval and limited disapproval.

Table 2 – Sections of the 2010 Subchapter 9 provisions proposed for limited approval and limited disapproval.

Section of the 2010 Subchapter 9 Provisions	Title	Information
252:100-9-1	Purpose	Propose limited approval and limited disapproval
252:100-9-8(a)	Affirmative defenses – General	Propose limited approval and limited disapproval
252:100-9-8(b)	Affirmative defenses for excess emissions during malfunctions	Propose limited approval and limited disapproval

Section of the 2010 Subchapter 9 Provisions	Title	Information
252:100-9-8(c)	Affirmative defenses for excess emissions during startup and shutdown	Propose limited approval and limited disapproval
252:100-9-8(d)	Affirmative defenses prohibited	Propose limited approval and limited disapproval
252:100-9-8(e)	Affirmative defense determination	Propose limited approval and limited disapproval

The EPA has utilized the limited approval approach numerous times in SIP actions across the nation over the last twenty years.³ As discussed in section II “Evaluation” below, EPA believes that approval of sections 252:100-9-1 and 252:100-9-8 of the 2010 Subchapter 9 provisions will strengthen the Oklahoma SIP and represent an overall improvement in the regulation of excess emissions as compared to the excess emissions provisions found in the Subchapter 9 provisions in the currently EPA-approved Oklahoma SIP (last approved by EPA in 1999); however, there are certain portions in the 2010 Subchapter 9 provisions (e.g., the creation of an affirmative defense for excess emissions resulting from startup and shutdown activities) which are inconsistent with identified CAA requirements. Because these revisions are an improvement over the currently approved SIP, but are not fully consistent with the CAA, EPA’s approval must be limited and we are concurrently proposing a limited disapproval. Finally, to ensure that the inconsistencies in these specific provisions with the CAA are corrected, EPA’s third action below is a proposed finding of substantial inadequacy and a proposed SIP call to address those provisions of the proposed limited approval and limited disapproval action which are

³ See, e.g., Approval and Promulgation of Implementation Plans; State of Georgia; 77 FR 38503 (June 28, 2012); and Limited Approval and Promulgation of Implementation Plans; Texas; 70 FR 50205 (August 26, 2005).

inconsistent with CAA requirements applicable to SIP revisions. If EPA finalizes the proposed limited approval and limited disapproval of sections 252:100-9-1 and 252:100-9-8 of the 2010 Subchapter 9 provisions, then EPA will also finalize the proposed finding of substantial inadequacy and proposed SIP call with respect to these provisions, as well.

Third Action:

As stated above, EPA's third action is a proposed finding of substantial inadequacy and proposed SIP call which, if finalized together with EPA's second action concerning the limited approval and limited disapproval, would require Oklahoma to submit revisions to those 2010 Subchapter 9 provisions in the limited approval and limited disapproval found to be inconsistent with the identified CAA requirements, or otherwise submit revisions to its excess emission provisions that comport with the requirements of the CAA. For a discussion regarding the timeframe for the adoption and submission of proposed revisions to the Oklahoma SIP provisions concerning excess emissions found in the 2010 Subchapter 9 provisions, see section II(D) below.

As all of the sections of the 2010 Subchapter 9 provisions listed in Table 2 above are interrelated and not separable from one another other, as discussed in Section II(C) below, they are the subject of the today's proposed finding of substantial inadequacy and proposed SIP call. However, Table 3 below identifies the specific sections of the 2010 Subchapter 9 provisions which are inconsistent with the requirements of the CAA and form the basis for the proposed finding of substantial inadequacy and the proposed SIP call.

Table 3 - Sections of the 2010 Subchapter 9 provisions that form the basis for the proposed finding of substantial inadequacy and proposed SIP call.

Section of the 2010 Subchapter 9 Provisions	Title	Information
252:100-9-1	Purpose	Provisions not limited to excess emissions during unplanned events
252:100-9-8(a)	Affirmative defenses – General	Provisions also create an affirmative defense for planned events
252:100-9-8(c)	Affirmative defenses for excess emissions during startup and shutdown	Provisions establish criteria for affirmative defense for planned events

If finalized, the overall effect of the three actions proposed by EPA today will be the replacement of the existing Subchapter 9 provisions of the Oklahoma SIP (i.e., those provisions approved by EPA on November 3, 1999, (64 FR 59629 and codified at 40 CFR 52.1920(c)(48)), with the revisions contained in the specific 2010 Subchapter 9 provisions proposed for approval in today's first action and the specific 2010 Subchapter 9 provisions proposed for a limited approval and limited disapproval in today's second action. Thus, if today's proposed actions are finalized, the current Subchapter 9 provisions approved in 1999 into the Oklahoma SIP will be replaced by the 2010 Subchapter 9 provisions, and the entire 2010 Subchapter 9 provisions will become part of the Oklahoma SIP. It is important to note that if finalized, certain portions of the 2010 Subchapter 9 provisions pertaining to affirmative defenses will also be the subject of a finding of substantial inadequacy and a SIP call, as reflected by EPA's third action proposed today, and discussed in Section II(D) below.

Also, section 252:100-9-3 of the Subchapter 9 provisions in the current EPA-approved Oklahoma SIP is presently a subject of EPA's proposed Findings of Substantial Inadequacy and SIP Calls, 78 FR 12460 (February 22, 2013) (EPA's February 22, 2013 Proposed Startup, Shutdown, and Malfunction (SSM) SIP Calls). If today's actions are finalized, then the Subchapter 9 provisions in the currently EPA-approved Oklahoma SIP (including section 252:100-9-3 of those Subchapter 9 provisions) will no longer be part of the Oklahoma SIP. Consequently, if EPA finalizes approval of the 2010 Subchapter 9 provisions, any outstanding SIP call related to section 252:100-9-3 of the currently EPA-approved SIP, such as the one proposed under EPA's February 22, 2013 Proposed SSM SIP Calls, will be moot, because section 252:100-9-3 of currently EPA-approved Oklahoma SIP will no longer be part of the federally-approved Oklahoma SIP. Final approval of the 2010 Subchapter 9 provisions will resolve the specific SIP deficiencies that EPA identified in the EPA's February 22, 2013 Proposed SSM SIP Calls.

As discussed below, EPA's proposed finding of substantial inadequacy and proposed SIP call (with respect to today's second action concerning the limited approval and limited disapproval of certain provisions of the 2010 Subchapter 9 provisions) relates to specific inseparable sections (or inseparable words within a section) of the 2010 Subchapter 9 provisions. More specifically, EPA is proposing to find that the inclusion of an affirmative defense for excess emissions during startup and shutdown, such as the one contained in sections 252:100-9-8(a) and (c) of the 2010 Subchapter 9 provisions, is inconsistent with the requirements of CAA section 110. Further, it is contrary to the fundamental enforcement structure provided in CAA sections 113 and 304, thereby constituting a substantial inadequacy, which renders those SIP provisions impermissible. See Section II "Evaluation" below and also EPA's February 22, 2013

Proposed SSM SIP Calls, a copy of which is included in the docket for this rulemaking, for a more detailed discussion of the affirmative defense for planned activities, such as startup and shutdown.

B. What documents did we use in our evaluation of the July 16, 2010 SIP submittal?

EPA's interpretation of the Act as it applies to SIP provisions that address excess emissions occurring during periods of startup, shutdown, and malfunction is set forth in a series of guidance documents. These guidance documents include: (1) a memorandum dated September 28, 1982, from Kathleen M. Bennett, Assistant Administrator for Air, Noise, and Radiation, entitled "Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions" (1982 Policy); (2) a memorandum, dated February 15, 1983, from Kathleen M. Bennett, Assistant Administrator for Air, Noise, and Radiation (1983 Policy); (3) a memorandum dated September 20, 1999, from Steven A. Herman, Assistant Administrator for Enforcement and Compliance Assurance and Robert Perciasepe, Assistant Administrator for Air and Radiation, entitled "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown" (1999 Policy); and (4) a memorandum dated December 5, 2001 from Eric Schaeffer, Director, Office of Regulatory Enforcement, Office of Enforcement and Compliance Assurance and John S. Seitz, Director, Office of Air Quality Planning and Standards, Office of Air and Radiation (2001 Policy).

EPA's interpretation of the CAA with respect to SIP provisions that address excess emissions during SSM events has been applied in rulemaking, including, but not limited to: (1) EPA's final rule for Utah's sulfur dioxide control strategy (Kennecott Copper), April 27, 1977 (42 FR 21472); (2) EPA's final rule for Idaho's sulfur dioxide control strategy, November 8,

1977 (42 FR 58171); (3) EPA’s “Finding of Substantial Inadequacy of Implementation Plan: Call for Utah State Implementation Plan Revision,” April 18, 2011 (76 FR 21639).

EPA has recently issued a proposal in response to a petition for rulemaking concerning CAA requirement for SIP provisions that address excess emissions, reiterating EPA’s interpretation of the CAA with respect to such provisions. See EPA’s February 22, 2013 Proposed SSM SIP Calls – Docket No. EPA-HQ-OAR-2012-0322; and EPA’s February 4, 2013, Statutory, Regulatory, and Policy Context Memorandum for the February 22, 2013 Proposed SSM SIP Calls. In this recent action, EPA has specifically addressed the requirements of the CAA with respect to SIP provisions that provide an affirmative defense for violations of emission limitations due to excess emissions during SSM events.

In addition, EPA evaluation responsibilities associated with the review of the July 16, 2010 SIP submittal draw upon the concepts of “separability” as expressed in *Bethlehem Steel Corp. v. Gorsuch*, 742 F. 2d 1028 (7th Cir. 1984) and the EPA memorandum, dated July 9, 1992, from John Calcagni, Director, Air Quality Management Division, entitled “Processing of State Implementation Plan (SIP) Submittals” (1992 Calcagni Memo). A copy of each relevant document is available in the docket for this rulemaking.

C. What is the background for this proposed rulemaking?

On January 25, 1984 (49 FR 3084), EPA approved Regulation 1.5, Reports Required: Excess Emissions During Startup, Shutdown and Malfunction of Equipment, into the Oklahoma SIP. This revision became effective on February 24, 1984. Later, Regulation 1.5 was recodified and renumbered by ODEQ (as Subchapter 9 Excess Emission and Malfunction Reporting Requirements) and approved by EPA as an administrative revision to the Oklahoma SIP on

November 3, 1999 (64 FR 59629) (1994 Subchapter 9 provisions). As of today's proposed action, the 1994 Subchapter 9 provisions remain part of the EPA-approved Oklahoma SIP. See part 1 of the Technical Support Document (TSD) prepared in conjunction with this proposed rulemaking.

On February 14, 2002, ODEQ submitted to EPA a revised version of Subchapter 9 that was not acted upon in the approval action of the Air Quality Implementation Plans; Oklahoma; Recodification of Regulations, published on December 29, 2008 at 73 FR 79400 (also known as the Oklahoma's Big SIP). See part 2 of the TSD. The Subchapter 9 portion of the February 14, 2002 submittal was subsequently withdrawn and replaced by ODEQ with the new Subchapter 9 provisions, as part of the July 16, 2010 SIP submittal which is the subject of today's proposed actions (2010 Subchapter 9 provisions). See part 3 of TSD.

II. Evaluation

A. Introduction

Under the principle of cooperative federalism, both states and EPA have authorities and responsibilities under the CAA with respect to SIPs. Pursuant to section 109 of the CAA, 42 USC §7409, EPA promulgates National Ambient Air Quality Standards (NAAQS) for criteria pollutants the attainment and maintenance of which are considered requisite to protect the public health and welfare. Under CAA section 107(a), each state has the primary responsibility for assuring that the NAAQS are attained and maintained throughout the state. Under section 110(a)(1) of the CAA, 42 USC §7410(a)(1), each state is required to develop and submit to EPA for approval a plan which provides for the implementation, maintenance, and enforcement of the NAAQS; such plans are called state implementation plans or SIPs. Section 110(a)(2) of the

CAA, 42 USC §7410(a)(2), requires each SIP to meet the requirements listed in section 110(a)(2)(A) through (M). Under CAA section 110(a)(2)(H)(ii), states have a specific duty to revise their SIPs whenever EPA finds that the SIP is substantially inadequate to comply with requirements established under the Act.

In the development of its SIP, a state has broad authority to develop the mix of emission limitations it deems best suited for its particular situation, but the exercise of this discretion is not unbridled. The states have the primary responsibility to develop SIPs that meet applicable statutory and regulatory requirements for attaining, maintaining, and enforcing the NAAQS. Under section 110(k) of the CAA, however, EPA is required to determine whether or not a SIP submission in fact meets all applicable requirements of the Act. EPA is authorized to approve, disapprove, partially approve and partially disapprove, or conditionally approve a given SIP submission, as appropriate. When a SIP submission does not meet the applicable requirements of the CAA, EPA is obligated to disapprove it, in whole or in part, as appropriate. In addition, when EPA finds a state's existing SIP is substantially inadequate to attain or maintain a NAAQS or otherwise to comply with any other CAA requirement, EPA is authorized under section 110(k)(5) to require the state to revise its SIP as necessary to correct such inadequacies.

Sections 110(l) and 193 of the CAA impose additional requirements upon EPA when reviewing a state's proposed revision to its SIP. Section 110(l) of the CAA, 42 USC §7410(l), provides that EPA may not approve a SIP revision if "the revision would interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable requirement of this chapter." In addition, section 193 of the CAA prohibits SIP revisions that would affect control measures in effect prior to the 1990 amendments to the CAA in any area that is designated nonattainment for any NAAQS, unless the modification insures

equivalent to greater emission reductions of such air pollutant. A more detailed discussion of the SIP requirements that may be relevant to this rulemaking are included in the docket, including section VIII “Legal Authority, Process, and Timing for SIP Calls” of EPA’s February 22, 2013 Proposed SSM SIP Calls (78 FR 12483), and the associated legal memorandum in the docket for that rulemaking.

The statutory framework summary presented above underlies EPA’s evaluation of SIP submissions as they relate to excess emissions. The EPA has a longstanding interpretation of the CAA with respect to the treatment of excess emissions during periods of startup, shutdown or malfunctions in SIPs. See section I(B) above. Central to EPA’s interpretation is the definition of “emission limitation” and “emission standard” contained in CAA section 302(k), 42 USC §7602(k), which are defined as limitations that must be met on a continuous basis. Under section 110(a)(2)(A) of the Act, 42 USC §7410(a)(2)(A), each SIP must include enforceable emission limitations and other control measures as may be necessary or appropriate to meet the applicable requirements of the Act. In addition, under CAA section 110(a)(2)(C), 42 USC §7410(a)(2)(C), each SIP must include a program to provide for the enforcement of the measures described in CAA section 110(a)(2)(A) and provide for the regulation of sources as necessary to ensure the attainment and maintenance of the NAAQS and protection of Prevention of Significant Deterioration (PSD) increments.

While the CAA requires that emission limitations in a SIP must be met on a “continuous” basis, compliance with such limitations 100% of the time may be practically and technologically impossible. Case law holding that technology-based standards should account for the practical realities of technology support EPA’s view that an enforcement program under a SIP that incorporates some level of flexibility is reasonable and consistent with the overall intent of the

CAA.⁴ While EPA views all excess emissions as violations of emission limitations or emission standards, we recognize that, in certain situations, imposition of a civil penalty for sudden and unavoidable malfunctions caused by circumstances entirely beyond the control of the owner or operator may not be appropriate.

In addressing excess emissions due to sudden and unavoidable malfunctions, the EPA has provided guidance on three approaches states may use: (1) traditional enforcement discretion; (2) SIP provisions that address the exercise of enforcement discretion by state personnel; and (3) SIP provisions that provide a narrowly tailored affirmative defense to civil penalties. Under the first approach, the State (or another entity, such as EPA, seeking to enforce a violation of the SIP) may consider the facts and circumstances surrounding the event in determining whether to pursue enforcement. Under the second approach, states may elect to create SIP provisions that provide parameters for the exercise of enforcement discretion by state personnel, so long as they do not affect enforcement by EPA or citizens. Under the third approach, states may elect to create SIP provisions that establish an affirmative defense that may be raised by the defendant in the context of an enforcement proceeding for civil penalties (not injunctive relief), and for which the defendant has the burden to prove that certain criteria have been met. See page 2 of the Attachment to the 1999 Policy; see also EPA's February 22, 2013 Proposed SSM SIP Calls, at 78 FR 12478.

Most relevant to this action, EPA interprets the CAA to allow SIP provisions that provide an affirmative defense, so long as they are appropriately drawn. EPA guidance recommends criteria that it considers necessary to assure that the affirmative defense is consistent with CAA requirements for SIP provisions. The EPA believes that narrowly-tailored affirmative defense

⁴ See, e.g., *Essex Chemical v. Ruckelshaus*, 486 F.2d 427, 433 (D.C. Cir. 1973); and *Portland Cement Association v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973)

provisions can supply flexibility both to ensure that emission limitations are “continuous” as required by CAA section 302(k) because any violations remain subject to a claim for injunctive relief, and to provide limited relief in actions for penalties for malfunctions that are beyond the control of the owner where the owner has taken necessary steps to minimize the likelihood and extent of any such violation. Several courts have agreed with this approach.⁵ Neither the enforcement discretion nor the affirmative defense approaches may waive reporting requirements for the violation. States are not required to employ an affirmative defense approach, but if they choose to do so, EPA will evaluate the state’s SIP provisions for consistency with the Act as interpreted by our policy and guidance, including those documents listed in section I.B above. In the 2010 Subchapter 9 provisions of its July 16, 2010 SIP submittal, ODEQ adopted the affirmative defense approach to address excess emissions events.

EPA acknowledges that ODEQ developed these affirmative defenses in the July 16, 2010 SIP submittal, consistent with EPA guidance at that time. However, EPA has reexamined its interpretation of the CAA with respect to affirmative defenses and accordingly believes that such affirmative defenses are only appropriate in the case of unplanned events like malfunctions, not in the case of planned events such as startup and shutdown for which sources should be expected to comply with applicable SIP emission limitations. Under CAA section 110(k) and section 110(l), EPA is obligated to determine whether SIP submissions in fact meet CAA requirements and our interpretation of the Act at the time EPA takes action on the SIP submission.

B. Why are we proposing approval of portions of the July 16, 2010 SIP submittal?

⁵ See, *Luminant Generation Co. v. EPA*, 714 F.3d 841 (5th Cir. 2013), *Cert. pending* (upholding the EPA’s approval of an affirmative defense applicable during malfunctions in a SIP submission as a permissible interpretation of the statute under Chevron step 2 analysis); *Mont. Sulphur & Chemical Co. v. EPA*, 666 F.3d 1174 (9th Cir. 2012); and *Ariz. Public Service Co. v. EPA*, 562 F.3d 1116, 1130 (9th Cir. 2009).

Consistent with provisions of section 110(k) and section 110(l) of the CAA, 42 USC §§ 7410(k) and 7410(l), EPA believes that there are portions of the 2010 Subchapter 9 provisions which are consistent with the requirements of the CAA for SIPs and would not interfere with any applicable requirement concerning attainment and reasonable further progress or any other applicable requirement of the CAA. These provisions are identified in Table 1 above and include: (1) section 252:100-9-1.1 Applicability, which provides that owners and operators of air contaminant sources are subject to the requirements of this subchapter; (2) section 252:100-9-2, which defines terms that are frequently used in the Subchapter 9 provisions; and (3) sections 252:100-9-7(a) through (e) which address the notification, reporting requirements, and certificate of accuracy of the information concerning excess emissions events. Together these provisions require owners and operators to notify and report excess emissions to ODEQ within specified timeframes.

The proper notification and reporting of excess emission events and the relevant information corresponding to those events will enable ODEQ to review, evaluate, and utilize the information submitted as a tool in its air quality planning/management efforts and assist its efforts to provide for attainment and maintenance of the NAAQS and other applicable requirements of the Act. These applicability, definitions, and notification requirements in the 2010 Subchapter 9 provisions are independent from the affirmative defense requirements set forth in section 252:100-9-8 of the 2010 Subchapter 9 provisions. In other words, approval of these provisions (section 252:100-9-1.1, section 252:100-9-2, and sections 252:100-9-7(a) through (e)) into the Oklahoma SIP is consistent with, and will not render other sections of the 2010 Subchapter 9 provisions more stringent than what the State intended or anticipated when ODEQ adopted the 2010 Subchapter 9 provisions. Therefore, EPA believes that the proposed

approval of these provisions are separable from the remainder of the 2010 Subchapter 9 provisions submitted as part of the July 16, 2010 SIP submittal. In particular, we believe that EPA's approval of these specific provisions will not result in sections 252:100-9-1.1, 252:100-9-2, and 252:100-9-7(a) through (e), as reflected in the first action, being more stringent than ODEQ anticipated or intended. See *Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028, 1036-37 (7th Cir. 1984); see also 1992 Calcagni Memo.

Furthermore, proposed approval of the specific provisions covered by the first action would enhance the ability of the State, EPA, and citizens to address excess emissions-related activities consistent with CAA sections 110, 113, 302(k) and 304, while simultaneously eliminating the discretionary exemptions from compliance with otherwise applicable emission limitations under the Subchapter 9 provisions in the currently EPA-approved Oklahoma SIP. Removal of the existing provisions that allow exemptions for excess emissions during SSM events via the exercise of director's discretion brings the Oklahoma SIP into compliance with CAA requirements with respect to this issue.

As explained in more detail in EPA's February 22, 2013 Proposed SSM SIP Calls (78 FR 12460), such director's discretion provisions are inconsistent with fundamental CAA requirements for SIP provisions. Therefore, our proposed approval of those sections of the 2010 Subchapter 9 provisions covered by this first proposed action improves the SIP for Oklahoma and comports with the standards governing SIP revisions as set forth in section 110(k) and section 110(l) of the Act. EPA believes that the specific sections of the 2010 Subchapter 9 provisions, identified in the first action of this document, meet the statutory requirements of the Act for SIP provisions and assist in providing for attainment and maintenance of the NAAQS and protection of PSD increments. We are therefore proposing the approval of sections 252:100-

9-1.1, 252:100-9-2, and 252:100-9-7(a) through (e) of the 2010 Subchapter 9 provisions as a revision to the SIP for Oklahoma.

C. Why are we proposing a limited approval and limited disapproval of portions of the July 16, 2010 SIP submittal?

In some cases, a SIP submittal may contain certain provisions that meet the applicable requirements of the Act along with other provisions that do not meet CAA requirements, and the provisions are not separable. Although the submittal may not meet all of the applicable requirements, EPA may consider whether the submittal as a whole has a strengthening effect on the SIP. If that is the case, a limited approval may be used to approve a rule that strengthens the existing SIP, because it constitutes an improvement over what is currently in the SIP and meets some of the applicable requirements of the Act. If the rule does not meet all of the applicable requirements, EPA may elect to use a limited disapproval in conjunction with the limited approval. The Act does not expressly provide for limited approvals and limited disapprovals; rather, EPA is using its "gap-filling" authority under section 301(a) of the Act, 42 USC §7601(a), in conjunction with the authority under CAA section 110(k)(3), to interpret the Act to provide for this type of approval action.

The primary advantage to using the limited approval approach is to make the state's SIP submittal federally enforceable and to increase the SIP's potential to achieve additional emission reductions. The utility of the limited disapproval approach is to identify the specific aspects of the SIP submittal that are not fully consistent with CAA requirements so that the state may then take appropriate action to make necessary SIP revisions. EPA's evaluation of the 2010 Subchapter 9 provisions submitted by Oklahoma indicates that certain portions of the SIP

submittal present a situation where a limited approval and limited disapproval is the correct approach.

EPA is proposing limited approval and limited disapproval of the following portions of the 2010 Subchapter 9 provisions submitted as part of the July 16, 2010 SIP submittal: (1) section 252:100-9-1 Purpose, which sets forth the purpose of the 2010 Subchapter 9 provisions and includes a reference to the affirmative defense provisions; and (2) section 252:100-9-8, Affirmative defenses. As discussed below, these provisions as a whole strengthen the SIP, even though there are portions of these provisions which are inconsistent with CAA requirements for SIP provisions as they relate to affirmative defenses for violations due to excess emissions during certain types of events. Furthermore, EPA finds that those portions which are inconsistent with the requirements of the Act are not separable from the remainder of the provisions that are consistent with the CAA requirements. Therefore, EPA is proposing a limited approval and limited disapproval of these provisions as a whole. The following paragraphs discuss each of these provisions in detail and describe why EPA believes that they do not meet applicable CAA requirements.

Section 252:100-9-1. Purpose of the 2010 Subchapter 9 provision is inconsistent with the requirements of the CAA because it contains an overly broad reference to the affirmative defense provisions for excess emissions. The term “excess emissions,” defined in section 252:100-9-2, is not limited to excess emissions occurring during unplanned events such as malfunctions. As explained in detail below, EPA believes that the creation of an affirmative defense for violations due to excess emissions from planned events – such as startup, shutdown, and maintenance – is inconsistent with the requirements of CAA section 110(a) and is inconsistent with the

fundamental enforcement structure provided in CAA sections 113 and 304.⁶ Should Oklahoma elect to incorporate an affirmative defense provision for excess emissions during unavoidable violations into the Oklahoma SIP, then section 252:100-9-1 should be revised to limit the affirmative defense reference only to those excess emissions during malfunctions, as discussed below.

EPA's evaluation of the affirmative defense provisions established in section 252:100-9-8 of the 2010 Subchapter 9 provisions begins with section 252:100-9-8(a). The first sentence of that section states that all excess emissions regardless of cause are violations; however, the second sentence in that section provides an affirmative defense applicable to violations due to excess emissions during startup, shutdown and malfunction (all three categorical events). Section 252:100-9-8(a) as submitted is an improvement to the current EPA-approved SIP for excess emissions (i.e., the 1994 Subchapter 9 provisions). For example, as discussed in the TSD included in the docket for this rulemaking, section 252:100-9-3 of the current EPA-approved Oklahoma SIP creates an exemption via director discretion, such that excess emissions during startup, shutdown, malfunction, or maintenance are not violations of the applicable emission limitations.

In accordance with CAA sections 110(a)(2)(A) and 302(k), SIPs must contain "emission limitations" and those limitations must be continuous. Thus, any excess emissions above the level of the applicable SIP emission limitations must be considered a violation of such limitations. In addition, SIP provisions that operate to create exemptions from SIP requirements through the exercise of director's discretion are also inconsistent with CAA requirements for SIP revisions. For these reasons, as discussed in EPA's February 22, 2013 Proposed SSM SIP Calls

⁶ See *Luminant Generation Co. v. EPA*, 714 F.3d 841,856 (5th Cir. 2013) *Cert. pending*, acknowledging EPA's belief that "an effective enforcement program must be able to collect penalties to deter avoidable violations." See also, EPA's February 22, 2013 Proposed SIP Calls (78 FR 12460, 12480).

(78 FR 12524), EPA has already proposed a finding of substantial inadequacy and proposed a SIP call with respect to OAC 252:110-9-3 of the currently EPA-approved Oklahoma SIP.

Section 252:100-9-8(a) of the 2010 Subchapter 9 provisions is an improvement to the current EPA-approved Oklahoma SIP because it eliminates the exemption via director discretion provision, so that all excess emissions regardless of cause are considered violations.

However, section 252:100-9-8(a) is also inconsistent with the requirements provided in CAA sections 110(a)(2) and conflicts with the fundamental enforcement structure provided in CAA sections 113 and 304, because it creates an affirmative defense for violations due to excess emissions during startups and shutdowns. As explained in Section VII(C), “Affirmative Defense Provisions During Periods of Startup and Shutdown,” of EPA’s February 22, 2013 Proposed SIP Calls, EPA’s approval of a SIP provision which provides a limited affirmative defense to a source for excess emissions during periods of *malfunction* may be permissible, but EPA’s approval of such a defense would not be permissible for excess emissions during periods of *startup and shutdown*. See 78 FR 12480. EPA believes that providing affirmative defenses for avoidable violations, such as those resulting from excess emissions during planned events such as startups and shutdowns, that are within the control of the owner or operator of the source, is inconsistent with the requirements provided in CAA section 110(a) and the fundamental enforcement structure provided in CAA sections 113 and 304, which provide for potential civil penalties for violations of SIP requirements.

SIP provisions providing affirmative defenses can be appropriate for malfunctions because, by definition and unlike planned startups and shutdowns, malfunctions are unforeseen and could not have been avoided by the owner or operator of the source, and the owner or operator of the source will have taken steps to

prevent the violation and to minimize the effects of the violation after it occurs. In such circumstances, EPA interprets the Act to allow narrowly drawn affirmative defense provisions that may provide relief from civil penalties (but not injunctive relief) to owners or operators of sources, when their conduct justifies this relief. Such is not the case with planned and predictable events, such as startups and shutdowns, during which the owners or operators of sources should be expected to comply with applicable SIP emission limitations and should not be accorded relief from civil penalties if they fail to do so.⁷ Providing an affirmative defense for monetary penalties for violations that result from planned events is inconsistent with the basic premise that the excess emissions were beyond the control of the owner or operator of the source, and thus is diametrically opposed to the intended purpose of such an affirmative defense to encourage better compliance even by sources for which 100 percent compliance is not possible.

As explained above, EPA interprets the CAA to allow a SIP revision which provides a narrowly tailored affirmative defense for excess emissions due to malfunctions; however, it cannot approve such a defense for excess emissions during planned events such as startups and shutdown activities. Separating the words “startup” and “shutdown” from the remainder of the second sentence in section 252:100-9-8(a) could make the approval of the remainder of that section more stringent than Oklahoma anticipated or intended. For example, had Oklahoma known at the time of the rule adoption it would be impermissible for EPA to approve a SIP revision which creates an affirmative defense for excess emissions due to startups and

⁷ EPA notes that a state can elect to adopt alternative emission limitations that apply to normal modes of source operation, such as startup and shutdown, so long as these provisions are consistent with CAA requirements. EPA’s February 22, 2013 Proposed SSM SIP Calls also provides guidance on how such SIP provisions may be developed to meet CAA requirements.

shutdowns, ODEQ may have elected to establish alternative emission limitations or other control measures or techniques designed to minimize emissions during startup and shutdown activities in lieu of the affirmative defense. Applying the principles established in *Bethlehem Steel* and as expressed in the 1992 Calcagni Memo, we believe that in this particular factual scenario with the wording of these specific provisions, EPA cannot merely excise the words “startup” and “shutdown” from the second sentence in section 252:100-9-8(a), and approve the remainder of the section into the Oklahoma SIP.⁸

Likewise, in looking at the other provisions of section 252:100-9-8, we believe that they are not separable from section 252:100-9-8(a), which is the general provision that establishes the affirmative defenses for startup, shutdown, and malfunction events in the first instance. That is, the general provisions of section 252:100-9-8(a) which create the affirmative defenses are inextricably intertwined with the remainder of the other provisions in section 252:100-9-8 (that is, sections 252:100-9-8(b) through 252:100-9-8(e)), and those latter provisions cannot stand by themselves. Given that EPA cannot propose a full approval of section 252:100-9-8, it follows that EPA cannot propose full approval of section 252:100-9-1 which states that part of the purpose of the Subchapter 9 provisions is to establish affirmative defenses for excess emissions for all three categories of events, as discussed above.

Although EPA cannot propose full approval of section 252:100-9-8(a), we have evaluated section 252:100-9-8(b) with respect to the affirmative defense for excess emissions during malfunctions for consistency with CAA requirements. This provision requires that in asserting an affirmative defense for excess emissions during malfunctions, the owner or operator of a facility must demonstrate certain criteria by a preponderance of evidence in order to qualify for

⁸ See *Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028, 1036-37 (7th Cir. 1984); see also 1992 Calcagni Memo at 2.

the affirmative defense in a judicial or administrative proceeding. EPA has guidance making recommendations for criteria appropriate for affirmative defense provisions that would be consistent with the requirements of the CAA. EPA's 1999 Policy and the February 22, 2013 Proposed SSM SIP Calls lay out these criteria. These are guidance recommendations and states do not need to track EPA's recommended wording verbatim, but states should have SIP provisions that are consistent with these recommendations in order to assure that the affirmative defense meets CAA requirements. Our evaluation indicates that the affirmative defense criteria set forth in 252:100-9-8(b) combined with the requisites set forth in sections 252:100-9-8(d) and (e) are sufficiently consistent with these recommended criteria for affirmative defense provisions in SIPs for malfunctions. For a detailed comparison of the affirmative defense criteria for malfunctions in the 2010 Subchapter 9 provisions with those recommended in EPA's guidance, see the TSD.

Therefore, as part of the limited approval, we propose that these sections constitute a sufficiently narrow affirmative defense provision for malfunctions that would not interfere with the CAA requirements discussed above. As such, section 252:100-9-8(b) of the 2010 Subchapter 9 provisions is not itself substantially inadequate and is not the basis for the proposed SIP call that is part of the third action proposed today. However, because the affirmative defense for malfunction events is not separable from the affirmative defense provision applicable to startup and shutdown events, it will nevertheless be included in the proposed finding of substantial inadequacy and proposed SIP call in the third action. Should Oklahoma elect to establish an affirmative defense restricted to malfunctions, then section 252:100-9-8(b) could be resubmitted at ODEQ's discretion.

As part of the limited disapproval, we propose that the affirmative defense provisions

applicable to startup and shutdown are not consistent with CAA requirements for SIP provisions. Section 252:100-9-8(c) provides that in asserting an affirmative defense for excess emissions during startup and shutdown, the owner or operator of a facility must demonstrate certain criteria by a preponderance of evidence in a judicial or administrative proceeding. As discussed above, however, an affirmative defense for planned events, such as startup and shutdown, is inconsistent with and would interfere with the requirements of CAA section 110(a) and the fundamental enforcement structure provided in CAA sections 113 and 304 which provide for potential civil penalties for violations of SIP emission limits. Accordingly, these deficiencies in section 252:100-9-8(c) form part of the basis for the proposed finding of substantial inadequacy and proposed SIP call, as discussed in the third action proposed today.

Section 252:100-9-8(d) identifies situations where assertion of the affirmative defense is not allowed and Section 252:100-9-8(e) states that the Director will consider the notification requirements, in addition to other relevant information in the determination process⁹, but such determinations should not be construed as limiting EPA or citizens' authority to enforce the emission limits of the SIP under the Act. Taken together, these sections provide for enforcement and compliance determination of a source during excess emission events. If limited to affirmative defenses for violations due to excess emissions during malfunctions, these two provisions would not interfere with the requirements set forth in CAA sections 110(a) and 302(k), nor would such sections be inconsistent with the fundamental enforcement structure provided in CAA sections 113 and 304. Accordingly, sections 252:100-9-8(d) and 252:00-9-8(e) are not substantially inadequate with CAA requirements and do not form the basis for the

⁹ We note that 252:100-9-8(a) of the 2010 Subchapter 9 provisions provides an affirmative defense to owners and operators for civil or administrative penalty actions for excess emissions during emission events. We interpret the “determination” language in 252:100-9-8(e) to mean how the Director determines whether or not to pursue enforcement against an owner and operator for excess emissions violations.

proposed finding of substantial inadequacy and proposed SIP call, as discussed in the third action proposed today.

In summary, EPA believes that the affirmative defense provisions of section 252:100-9-8, taken as a whole, when compared against the currently EPA-approved SIP provisions for excess emissions, would strengthen the SIP for Oklahoma, if approved. However, there are specific provisions, namely those that would provide for affirmative defenses for violations due to excess emission during planned events such as startups and shutdowns, which are inconsistent with applicable requirements of the CAA for SIP purposes. Therefore, we are proposing a limited approval and limited disapproval of sections 252:100-9-1 and 252:100-9-8 of the 2010 Subchapter 9 provisions into the SIP for Oklahoma. If EPA finalizes the limited approval and limited disapproval, these sections (sections 252:100-9-1 and 252:100-9-8) will become part of the SIP and federally enforceable until EPA approves a revised submission from Oklahoma that is fully approvable. To ensure Oklahoma addresses the three sections that form the basis of EPA's limited approval and limited disapproval (sections 252:100-9-1, 252:100-9-8(a), and 252:100-9-8(c)) we are simultaneously proposing a finding of substantial inadequacy and SIP call to address these three sections, if EPA finalizes that limited approval and limited disapproval in the final action. The next section discusses the proposed finding of substantial inadequacy and proposed SIP call in more detail.

D. Why are we proposing a finding of substantial inadequacy and a SIP call?

As stated in Section II(C) above, today's action proposes the limited approval and limited disapproval of those portions of the 2010 Subchapter 9 provisions identified in Table 2 above. Should today's second action be finalized as proposed, all of those provisions will become part

of the Oklahoma SIP. However, as noted above, we recognize that certain portions of those provisions (pertaining in various ways to the affirmative defense provisions applicable to startup and shutdown events) do not meet all CAA requirements for SIP purposes. In order to ensure that Oklahoma takes action to correct those specific deficiencies, we are also proposing a finding of substantial inadequacy and a SIP call with respect to the provisions for which EPA is proposing the limited approval and limited disapproval, which will be finalized when EPA finalizes the second action as proposed today. The legal basis for the finding of substantial inadequacy and the SIP call and a discussion of the specific provisions subject to the proposed SIP call are discussed below.

The CAA provides a mechanism for the correction of flawed SIPs, under CAA section 110(k)(5), which provides:

(5) Calls for plan revisions

Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standards, to mitigate adequately the interstate pollutant transport described in section [176A] of this title or section [184] of this title, or to otherwise comply with any requirement of [the Act], the Administrator shall require the State to revise the plan as necessary to correct such inadequacies. The Administrator shall notify the State of the inadequacies and may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions.

By its explicit terms, this provision authorizes the EPA to find that a state's SIP is "substantially inadequate" to meet CAA requirements and, based on that finding, to "require the State to revise the [SIP] as necessary to correct such inadequacies." This type of action is commonly referred to as a "SIP call." CAA section 110(k)(5) expressly directs EPA to take action if the SIP provision is substantially inadequate not just for purposes of attainment or maintenance of the NAAQS, but also for purposes of meeting "any requirement" of the CAA. In particular, EPA notes that section 110(k)(5) authorizes the agency to make such a finding and

issue a SIP call “whenever” it determines a state’s SIP to be substantially inadequate, and thus EPA has authority to propose such a finding and issue in SIP call prospectively in the event that it finalizes the limited approval and limited disapproval contemplated in this proposal. If our limited approval and limited disapproval is finalized, at that time the state’s SIP will be substantially inadequate due to the SIP provisions concerning affirmative defenses for startup and shutdown events.

As stated in Section II(C) above, the EPA interprets the CAA to allow only narrowly drawn affirmative defense provisions that are available for events that are entirely beyond the control of the owner or operator of the source. Thus, an affirmative defense may be appropriate for events like malfunctions, which are sudden and unavoidable events that cannot be foreseen or planned for. The underlying premise for an affirmative defense provision is that the source is properly designed, operated, and maintained, and could not have taken action to prevent the exceedance. Because the qualifying source could not have foreseen or prevented the event, the affirmative defense is available to provide relief from monetary penalties that could result from an event beyond the control of the source.

The legal and factual basis supporting the concept of an affirmative defense for malfunctions does not support providing an affirmative defense for normal modes of operation like startup and shutdown. Such events are planned and predictable. The source should be designed, operated, and maintained to comply with applicable emission limitations during normal and predictable source operation. Because startup and shutdown periods are part of a source's normal operations, the same approach to compliance with, and enforcement of, applicable emission limitations during those periods should apply as otherwise applies during a source's normal operations. If justified, the state can develop and submit to EPA for approval as

part of the SIP, alternative emission limitations or control measures that apply during startup and shutdown, if the source cannot meet the otherwise applicable emission limitations in the SIP.

Even if a source is a suitable candidate for alternative SIP emission limitations during startup and shutdown, however, that does not justify the creation of an affirmative defense in the case of excess emissions during such events. Because these events are planned, the EPA believes that sources should be able to comply with applicable emission limitations during these periods of time. To provide an affirmative defense for violations that occur during planned and predictable events for which the source should have been expected to comply is tantamount to providing relief from civil penalties for a planned violation.

EPA believes that adoption of affirmative defense provisions that include periods of normal source operation that are within the control of the owner or operator of the source, such as planned startup and shutdown, would be inconsistent with the requirements of CAA section 110(a) and the enforcement structure provided in CAA sections 113 and 304. Therefore, the affirmative defense provision for excess emissions during startup and shutdown created in section 252:100-9-8(a) of the 2010 Subchapter 9 provisions and the associated affirmative defense criteria for excess emissions during startup and shutdown as set forth in section 252:100-9-8(c) of the 2010 Subchapter 9 provisions are substantially inadequate to meet CAA requirements for the reasons stated above. In addition, section 252:100-9-1 of the 2010 Subchapter 9 provisions includes as a purpose of the 2010 Subchapter 9 provisions the establishment of affirmative defense provisions for excess emissions, without limiting the reference to affirmative defenses to excess emissions during malfunctions.

Accordingly, EPA is also proposing to find that section 252:100-9-1 of the 2010 Subchapter 9 provisions is substantially inadequate to meet the CAA requirements for the

reasons discussed above. Therefore, all three provisions identified in Table 3 (sections 252:100-9-1, 252:100-9-8(a), and 252:100-9-8(c)) are the basis for the proposed finding of substantial inadequacy and the proposed SIP call. Because those subsections are intertwined with the remainder of the section 252:100-9-8, the proposed limited approval and limited disapproval as well as the proposed finding of substantial inadequacy and proposed SIP call encompass all of 252:100-9-8 and 252:100-9-1, as discussed above.

In addition to providing general authority for a SIP call, CAA section 110(k)(5) sets forth the process and timing for such an action. First, the statute requires the EPA to notify the state of the final finding of substantial inadequacy. Second, the statute requires the EPA to establish "reasonable deadlines (not to exceed 18 months after the date of such notice)" for the state to submit a corrective SIP submission to eliminate the inadequacy in response to the SIP call. 42 USC §7410(k)(5). Third, the statute requires that any finding of substantial inadequacy and notice to the state be made public.

If EPA finalizes the proposed finding of substantial inadequacy and proposed SIP call for the 2010 Subchapter 9 provisions identified in Table 3 above, CAA section 110(k)(5) requires EPA to establish a SIP submission deadline by which Oklahoma must make a SIP submission to rectify the identified deficiencies. EPA is proposing that if it promulgates a final finding of substantial inadequacy and a SIP call for those 2010 Subchapter 9 provisions identified in Table 3 above, then EPA will establish a date no more than 18 months from the date of promulgation of the final finding for Oklahoma to respond to the SIP call. For consistency with EPA's February 22, 2013 Proposed SSM SIP Calls, under which section 252:100-9-3 of the currently EPA-approved Oklahoma SIP is already subject to a proposed SIP call (78 FR 12523), we are here proposing that Oklahoma revise the identified sections of the 2010 Subchapter 9 provisions

(section 252:100-9-1 and sections 252:100-9-8(a) and (c)) and submit a revision of those provisions consistent with CAA requirements along with the remainder of section 252:100-9-8, addressing the deficiencies identified in this proposal to EPA. This submittal date will be due no later than the earlier of the statutory maximum of eighteen months, or the due date by which areas subject EPA's February 22, 2013 Proposed SSM SIP Calls are required to revise and submit their SIPs to EPA¹⁰. Given that affirmative defenses for excess emissions are not required elements under the Act, today's proposed SIP call will not, by itself, trigger a sanction clock for Oklahoma.

If the state fails to submit the corrective SIP revision by the deadline that the EPA finalizes as part of the SIP call proposed in this action, then CAA section 110(k)(1)(B) authorizes EPA to find that the State has failed to make a complete submission, in whole or in part. Once EPA makes such a finding of failure to submit for a required SIP submission, CAA section 110(c)(1) requires EPA to "promulgate a Federal implementation plan at any time within 2 years after the [finding] . . . unless the State corrects the deficiency, and [the EPA] approves the plan or plan revision, before [the EPA] promulgates such [FIP]." Thus, if the EPA finalizes the proposed SIP call in this action and then finds that Oklahoma failed to submit a complete SIP revision that responds to the SIP call, or if EPA disapproves such SIP revision, then the EPA will have an obligation under CAA section 110(c)(1) to promulgate a FIP to address the identified SIP deficiency, no later than two years from the date of the finding or the disapproval, if the deficiency has not been corrected before that time.

III. Proposed Action

¹⁰ Nothing in today's rulemaking action for Oklahoma should be construed or interpreted as a re-opening of the public comment period for EPA's February 22, 2013 (78 FR 12460) Proposed Findings of Substantial Inadequacy and SIP Calls, or any issues associated with that separate rulemaking action.

Today, we are proposing full approval of the following provisions of Title 252, Chapter 100, Subchapter 9, Excess Emission Reporting Requirements as submitted on July 16, 2010, into the Oklahoma SIP:

Section 252:100-9-1.1 Applicability,

Section 252:100-9-2 Definitions,

Section 252:100-9-7(a) Immediate notice,

Section 252:100-9-7(b) Excess emission event report,

Section 252:100-9-7(c) Ongoing events,

Section 252:100-9-7(d) Alternative reporting, and

Section 252:100-9-7(e) Certificate of truth, accuracy and completeness required.

We are proposing to delete the following provisions of Title 252, Chapter 100, Subchapter 9 from the currently EPA-approved Oklahoma SIP:

Section 252:100-9-1 Purpose,

Section 252:100-9-2 Definitions,

Section 252:100-9-3 General reporting requirements,

Section 252:100-9-4 Maintenance procedures,

Section 252:100-9-5 Malfunctions and releases, and

Section 252:100-9-6 Excesses resulting from engineering limitations.

We are proposing a concurrent limited approval and limited disapproval of the following provisions of Title 252, Chapter 100, Subchapter 9 Excess Emission Reporting Requirements as submitted on July 16, 2010, into the Oklahoma SIP:

Section 252:100-9-1 Purpose, and

Section 252:100-9-8 Affirmative defenses.

We are also proposing a finding of substantial inadequacy and a SIP call of the provisions listed above for the proposed concurrent limited approval and limited disapproval, and note the following provisions of Title 252, Chapter 100, Subchapter 9, Excess Emission Reporting Requirements as submitted on July 16, 2010, as the basis for the proposed finding of substantial inadequacy and proposed SIP call:

Section 252:100-9-1 Purpose,

Section 252:100-9-8(a) General, and

Section 252:100-9-8(c) Affirmative defenses for excess emissions during startup and shutdown.

IV. Statutory and Executive Order Reviews:

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 USC §7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to act on state law and ensure that it meets Federal requirements; such review does not impose additional requirements beyond those imposed by state law. Additionally, under the Clean Air Act, a finding of substantial inadequacy and the subsequent obligation for a state to revise its SIP arise out of CAA sections 110(a) and 110(k)(5). The finding and state obligation do not directly impose any new regulatory requirements. In addition, the state obligation is not legally enforceable by a court of law. EPA will review its intended action on any SIP submittal in response to the finding in light of applicable statutory and Executive Order requirements, in any subsequent rulemaking acting on such SIP submittal.

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563:

Improving Regulation and Regulatory Review

This proposed action is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011).

B. Paperwork Reduction Act

This proposed action does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 USC 3501 et seq.) because this proposed action under section 110 of the CAA will not in-and-of itself create any new information collection burdens but simply approves or disapproves certain State requirements for inclusion into the SIP. The proposal to issue the SIP call only proposes an action that requires the state to revise its SIP to comply with existing requirements of the CAA. Burden is defined at 5 CFR 1320.3(b).

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.¹¹ This proposed action will not have a significant impact on a substantial number of small entities because SIP approvals and limited approvals/limited disapprovals under section 110 of the Clean

¹¹ Small entities include small businesses, small organizations, and small governmental jurisdictions. For purposes of assessing the impacts of this notice on small entities, small entity is defined as: (1) a small business that is a small industrial entity as defined in the U.S. Small Business Administration (SBA) size standards (see 13 CFR 121.201); (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

Air Act do not create any new requirements but simply approve requirements that the State is already imposing. The proposed SIP call is only an action that requires the state to revise its SIP to comply with existing requirements of the CAA. The EPA's action, therefore, would leave to the state the choice of how to revise the SIP provision in question to make it consistent with CAA requirements. Therefore, I certify that this action will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 USC 601 et seq.). Moreover, due to the nature of the Federal-State relationship under the Clean Air Act, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of State action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co., v. U.S. EPA*, 427 U.S. 246, 255–66 (1976); 42 USC 7410(a)(2).

D. Unfunded Mandates Reform Act

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 USC 1531– 1538, for State, local, or tribal governments or the private sector. The EPA has determined that the limited approval/limited disapproval proposal action does not include a Federal mandate that may result in estimated costs of \$100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This action proposes to approve or disapprove pre-existing requirements under State or local law, and imposes no new requirements. The proposed SIP Call may impose a duty on the state to meet its existing obligations to revise its SIP to comply with CAA requirements. The direct costs of this action, if finalized, would be those associated with preparation and submission of a SIP revision. Examples of such costs could include development of a state rule, conducting notice and public hearing, and other costs incurred in connection with a SIP

submission. These aggregate costs would be far less than the \$100-million threshold in any one year for the state. Thus, this proposed rule is not subject to the requirements of sections 202 or 205 of UMRA.

In addition since the only regulatory requirements of this proposed action would apply solely to the State of Oklahoma, this action is not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments.

E. Executive Order 13132 - Federalism

Executive Order 13132, entitled “Federalism” (64 FR 43255, August 10, 1999), requires the EPA to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” “Policies that have federalism implications” is defined in the Executive Order to include regulations that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” This proposed action does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it merely approves or disapproves certain State requirements for inclusion into the SIP and does not alter the relationship or the distribution of power and responsibilities established in the CAA. The proposed SIP call is required by the CAA because the EPA is proposing to find that the current SIP of the State is substantially inadequate to meet fundamental CAA requirements. In addition, the effects on the

State will not be substantial because the SIP call will require the State to submit only those revisions necessary to address the SIP deficiencies and applicable CAA requirements. While this action may impose direct effects on the State, the expenditures would not be substantial because they would be far less than \$25 million in the aggregate in any one year. Thus, Executive Order 13132 does not apply to this action.

E. Executive Order 13175 - Consultation and Coordination with Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). In this action, the EPA is not addressing any tribal implementation plans. This action is limited to the State of Oklahoma, and the SIP provisions which are the subject of the proposed actions do not apply to sources of emissions located in Indian country. Thus, Executive Order 13175 does not apply to this action. However, the EPA invites comment on this proposed rule from tribal officials.

G. Executive Order 13045 - Protection of Children from Environmental Health Risks and Safety Risks

The EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This proposed action is not subject to Executive Order 13045 because it is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997). This proposed action under section 110 of the CAA will not in and of itself create any new regulations but simply approves or disapproves certain State

requirements for inclusion into the SIP. The proposed SIP Call is not subject to EO 13045 because it would not establish an environmental standard, but instead would require Oklahoma to revise a state rule to address requirements of the CAA. Therefore the proposed action is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997).

H. Executive Order 13211 - Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not a "significant energy action" as defined in Executive Order 13211 (66 FR 28355(May 22, 2001)), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This action merely prescribes the EPA's action for the State regarding its obligations for SIP under the CAA.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (“NTTAA”), Public Law 104–113, section 12(d) (15 USC 272 note) directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs the EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

The EPA believes that this proposed action is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 USC 272 note) because

application of those requirements would be inconsistent with the Clean Air Act. This proposed rulemaking does not involve technical standards. Therefore, the EPA is not considering the use of any voluntary consensus standards.

J. Executive Order 12898 - Federal Actions to Address Environmental Justice in Minority

Populations and Low-Income Populations

Executive Order 12898 (12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

The EPA lacks the discretionary authority to address environmental justice in this proposed action. In reviewing SIP submissions, the EPA's role is to approve or disapprove state choices, based on the criteria of the CAA. Accordingly, this action merely proposes to approve or disapprove certain State requirements for inclusion into the SIP under section 110 of the CAA and will not in and of itself create any new requirements. The proposed action increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population. The proposed action is intended to ensure that all communities and populations across the State, including minority, low-income and indigenous populations overburdened by pollution, receive the full human health and environmental protection provided by

the CAA. This proposed action concerns the State's obligations regarding the treatment they give, in rules included in its SIP under the CAA, to excess emissions during startup, shutdown, and malfunctions. This proposed action would require Oklahoma to bring its treatment of these emissions into line with CAA requirements, which would lead to sources having greater incentives to control emissions during such events.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements, State implementation plan, Volatile organic compounds.

Dated: August 28, 2013.

Ron Curry,
Regional Administrator,
Region 6.

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